

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**Office of Enforcement and Compliance Assurance**

**IN THE MATTER OF:**

<div style="display: flex; justify-content: space-between;"><div style="width: 90%;"><p>UNITED STATES OF AMERICA,</p><p style="text-align: center;">Plaintiff,</p><p>and</p><p>STATE OF NEW YORK, ET AL.,</p><p style="text-align: center;">Plaintiff-Intervenors,</p><p style="text-align: center;">v.</p><p>AMERICAN ELECTRIC POWER SERVICE CORP., ET AL.,</p><p style="text-align: center;">Defendants.</p></div><div style="width: 5%; text-align: center;">)</div></div>	)	<p><b>NOTICE OF VIOLATION</b> EPA- CAA-2004-HQ-SS-001 Precedent to Complaint Amendment in the following action:</p> <p>U.S. Dist. Court Southern District(Eastern Div.) OH Civil Action No. C2-99-1182</p> <p>JUDGE SARGUS</p> <p>MAGISTRATE JUDGE KEMP</p>
<div style="display: flex; justify-content: space-between;"><div style="width: 90%;"><p>OHIO CITIZEN ACTION, ET AL.,</p><p style="text-align: center;">Plaintiffs,</p><p style="text-align: center;">v.</p><p>AMERICAN ELECTRIC POWER SERVICE CORP., ET AL.,</p><p style="text-align: center;">Defendants.</p></div><div style="width: 5%; text-align: center;">)</div></div>	)	<p>Civil Action No. C2-99-1250 (Consolidated with No. C2-99-1182)</p>

**NOTICE OF VIOLATION**

This Notice of Violation ("Notice") is issued to American Electric Power Service Corporation ("AEP"); Indiana Michigan Power Company, d/b/a American Electric Power; Ohio Power Company, d/b/a American Electric Power; Appalachian Power Company, d/b/a American Electric Power; Columbus & Southern Ohio Electric Company, d/b/a American Electric Power; Cardinal Operating Company; and Central Operating Company (herein after referred to collectively as the "AEP Companies") for violations of the Clean Air Act ("Act"), 42 U.S.C.

§§ 7401-7671q and §§ 7501-7515, at the coal-fired power plants identified below. The AEP Companies have embarked on a program of modifications intended to extend the useful life, regain lost generating capacity and/or increase capacity at their coal-fired power plants.

Commencing at various times since 1978 and continuing to today, the AEP Companies identified below have modified and operated the coal-fired power plants identified below without obtaining New Source Review ("NSR") permits authorizing the construction and/or operation of physical modifications of their boiler units as required by the Act. In addition, for each physical modification at these power plants, the AEP Companies continue to operate the modified boiler units without installing pollution control equipment required by the Act and operating permit. These violations of the Act and the State Implementation Plans ("SIPs") of Indiana, Ohio, and West Virginia have resulted in the release of massive amounts of sulfur dioxide ("SO<sub>2</sub>"); nitrogen oxide ("NO<sub>x</sub>"), and particulate matter ("PM") into the environment. Until these violations are corrected, the AEP Companies will continue to release massive amounts of illegal SO<sub>2</sub>, NO<sub>x</sub>, and PM into the environment.

This Notice is issued pursuant to Section 113(a)(1) of the Act, as amended, 42 U.S.C. §§ 7401-7671q. Section 113(a) of the Act requires the Administrator of the United States Environmental Protection Agency ("EPA") to notify any person in violation of a state implementation plan or permit of the violations. The authority to issue this Notice has been delegated to the Director, Air Enforcement Division, EPA Office of Enforcement and Compliance Assurance.

### **STATUTORY AND REGULATORY BACKGROUND**

1. When the Clean Air Act was passed in 1970, Congress exempted existing facilities, including the coal-fired power plants that are the subject of this Notice, from many of its requirements. However, Congress also made it quite clear that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but ... this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices whenever the unit is proposed to be modified in such a way that its emissions may increase.
2. The NSR provisions of Parts C and D of Title I of the Clean Air Act require preconstruction review and permitting for modifications of stationary sources. See 42 U.S.C. §§ 7470-7492 and 7501-7575, respectively. Pursuant to applicable regulations, if a major stationary source is planning upon making a major modification, then that source must obtain either a PSD permit or a nonattainment NSR permit, depending on whether the source is located in an attainment or a nonattainment area for the pollutant being increased above the significance level. If a major stationary source is planning upon making a modification that is not major, it must obtain a general, or "minor" NSR permit

regardless of its location. To obtain the required permit, the source must agree to put on Best Available Control Technology ("BACT") for an attainment pollutant or achieve Lowest Achievable Emission Rates ("LAER") in a nonattainment area.

3. Pursuant to Part C of the Act, the SIPs of Ohio, Indiana, and West Virginia require that no construction or operation of a major modification of a major stationary source occur in an area designated as attainment without first obtaining a permit under the Prevention of Significant Deterioration ("PSD") regulations. See 40 C.F.R. § 52.21 40 C.F.R. § 52.1884 and Ohio Administrative Code ("OAC") 3745-31-01 to 3745-31-20, approved January 22, 2003, and effective March 10, 2003, (68 Fed. Reg. 2909), for Ohio; 40 C.F.R. § 52.21, 40 C.F.R. § 52.793 and 326 Indiana Administrative Code ("IAC") 2-1 and 2-2, conditionally approved March 3, 2003, and effective April 2, 2003, (68 Fed. Reg. 9892), for Indiana; and 45 C.S.R. § 14-6.1 for West Virginia.
4. Pursuant to Part D of the Act, the Indiana SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as nonattainment without first obtaining a permit under APC 19, approved Feb. 16, 1982, 40 C.F.R. § 52.770(c)(24) and 326 IAC 2-1 and 2-3, approved Oct. 7, 1994, 40 C.F.R. § 52.770(c)(94).
5. Pursuant to Part D of the Act, the Ohio SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as nonattainment without first obtaining a permit under OAC 3745-31, approved Oct. 31, 1980 (45 Fed. Reg. 72119) and Sept. 8, 1993 (58 Fed. Reg. 47211).
6. Pursuant to Part D of the Act, the West Virginia SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as nonattainment without first obtaining a permit under the 45 C.S.R. § 19, effective August 1, 1984, 40 C.R.R. § 52.2520(c)(22).
7. Pursuant to Section 110(a)(2)(C) of the Act, the Indiana SIP requires that no person shall commence construction or modification of any source or facility without first applying for, and obtaining a construction permit ("minor NSR"). See APC 19 and 326 IAC 2-1.
8. Pursuant to Section 110(a)(2)(C) of the Act, the Ohio SIP requires that no person shall commence construction or modification of any source or facility without first applying for and obtaining a construction permit ("minor NSR"). See OAC 3745-31.
9. Pursuant to Section 110(a)(2)(C) of the Act, the West Virginia SIP requires that no person shall commence construction or modification of any source or facility without first applying for and obtaining a construction permit ("minor NSR"). See 45 C.S.R. § 13-4.
10. The SIP provisions identified in this section are all federally enforceable pursuant to

Sections 110 and 113 of the Act.

### **FACTUAL BACKGROUND**

11. The AEP Companies are owners and/or operators of the facilities that are the subject of this Notice.
12. AEP and Ohio Power Company operate the Muskingum River Power Plant, a fossil fuel-fired electric utility steam generating plant located at County Road 32, Beverly, Ohio, in Waterford Township, Washington County, and Center Township, Morgan County. The plant consists of 5 boiler units with 1531 megawatt (MW) total generating capacity with unit startup dates of 1953, 1954, 1957, 1958, and 1968, respectively.
13. The Muskingum River Power Plant Units 1 through 4, are located in Washington County, an area that has the following attainment classifications from 1978 to the present (2004):

For NO2:	1978-present:	Attainment/Unclassifiable,
For SO2:	1978-1994:	Nonattainment
	1994-present	Attainment
For PM:	1978-1981:	Nonattainment (secondary TSP)
	1982-1991:	Attainment
	1992-1993:	Nonattainment (primary TSP)
		Unclassifiable (PM10)
	1994-present:	Unclassifiable
For O3	1978-2004:	Attainment
	2004-present:	Nonattainment

The Muskingum River Power Plant Unit 5, is located in Morgan County, an area that has the following attainment classifications from 1978 to the present (2004):

For NO2:	1978-present:	Attainment/Unclassifiable
For SO2:	1978-1994:	Nonattainment
	1994-present	Attainment
For PM:	1978-1981:	Nonattainment (secondary TSP)
	1982-1991:	Attainment (primary and secondary TSP)
	1992-1993:	Nonattainment (primary TSP)
		Unclassifiable (PM10)
	1994-present:	Unclassifiable
For O3:	1978-2004:	Attainment
	2004-present	Nonattainment

14. AEP, Ohio Power Company, and Cardinal Operating Company operate the Cardinal Power Plant, a fossil fuel-fired electric utility steam generating plant located at 306

Jefferson County Road 7 East, Brilliant, Ohio, in Wells Township, Jefferson County. The plant consists of 3 boiler units with 1800 MW total generating capacity with unit start-up dates of 1967, 1967, and 1977, respectively.

15. The Cardinal Power Plant is located in an area that has the following attainment classifications from 1980 to the present (2004):

For NO <sub>2</sub> :	1980-present:	Attainment/Unclassifiable
For SO <sub>2</sub> :	1980-1999:	Nonattainment
	1999-present	Attainment
For PM:	1980-1993:	Nonattainment
	1993-2001:	Unclassifiable for PM <sub>10</sub>
	2001-present	Attainment
For O <sub>3</sub> :	1980-2004:	Attainment
	2004-present	Nonattainment

16. AEP and Columbus & Southern Ohio Electric Company (C&SOE Company) operate the Conesville Power Plant, a fossil fuel-fired electric utility steam generating plant located at 47201 cr 273, Conesville, Ohio, in Franklin Township, Coshocton County. The plant consists of 6 boiler units with 2175 MW total generating capacity with unit start-up dates of 1959, 1957, 1962, 1973, 1976, and 1978, respectively.

17. The Conesville Power Plant is located in an area that has the following attainment classifications from 1979 to the present (2004):

For NO <sub>2</sub> :	1979-present:	Attainment
For SO <sub>2</sub> :	1979-2000:	Nonattainment
	2000-present	Attainment
For TSP:	1978-1996:	Attainment
For PM <sub>10</sub> :	1996-present:	Unclassifiable
For O <sub>3</sub> :	1980-present:	Attainment

18. AEP and Indiana Michigan Power Company operate the Tanners Creek Power Plant, a fossil fuel-fired electric utility steam generating plant located at I & M Street, Lawrenceburg, Indiana, in Lawrenceburg Township, Dearborn County. The plant consists of 4 boiler units with 1100 MW total generating capacity with unit start-up dates of 1951, 1952, 1954, and 1964, respectively.

19. The Tanners Creek Plant is located in an area that has the following attainment classifications from 1978 to the present (2004):

For NO <sub>2</sub> :	1978-present:	Attainment
For SO <sub>2</sub> :	1978-present:	Attainment

For TSP:	1978-1996:	Nonattainment
For PM10	1996-present:	Unclassifiable
For O3	1978-present:	Attainment

20. AEP, Central Operating Company, Appalachian Power Company and Ohio Power Company own and/or operate the boiler units at the Philip Sporn Power Plant, a fossil fuel-fired electric utility steam generating plant located at New Haven, Mason County, West Virginia. The plant consists of five boiler units with 1105 MW total generating capacity. The Philip Sporn Power Plant began operation in 1950.
21. The Philip Sporn Power Plant is located Mason County, West Virginia in an area that has the following attainment classifications from 1980 to the present (2004):
 

For NO2:	1978-2004:	Attainment
For SO2:	1978-2004:	Attainment
For PM:	1978-2004:	Attainment
For O3:	1978- 2004:	Attainment
22. AEP, Ohio Power Company, and Appalachian Power Company own and/or operate the John Amos Power Plant, a fossil fuel-fired electric utility steam generating plant located in St. Albans, Putnam County, West Virginia. The Plant consists of three boiler units with 2,932.6 MW total generating capacity. The John Amos Power Plant began operation in approximately 1971.
23. The John Amos Power Plant is located in an area that has the following attainment classifications from 1978 to the present (2004):
 

For NO2:	1978-2004:	Attainment/Unclassifiable
For SO2:	1978-2004:	Attainment
For PM:	1978-2004:	Attainment (primary TSP)
	1978-2004:	Attainment (secondary TSP)
	11/15/1990-2004:	Unclassifiable (PM-10)
For O3:	1978-12/9/1981:	Nonattainment
	12/9/81-11/15/1990	Attainment
	11/15/90- 9/6/1994	Moderate Nonattainment
	9/6/94- 6/1/ 2004:	Attainment.
24. AEP and Ohio Power Company own and/or operate the Kammer Power Plant, a fossil fuel-fired electric utility steam generating plant located in Moundsville, Marshall County, West Virginia. The plant consists of three boiler units with 712.4 MW total generating capacity. The Kammer Power Plant began operation in approximately 1958.
25. The Kammer Power Plant is located in an area that has the following attainment

classifications from 1978 to the present (2004):

For NO2:	1978-2003:	Attainment/Unclassifiable
For SO2:	1978-2003:	Attainment
For PM:	1978-9/19/1983:	Nonattainment (Primary TSP)
	9/19/83-2003:	Attainment (Primary & Secondary TSP)
	11/15/1990-2003:	Unclassifiable (PM-10)
For O3:	1978-2003:	Attainment/Unclassifiable

26. Each of the plants identified in 12-25 above emits or has the potential to emit at least 100 tons per year of NOx, SO2 and PM and is a major emitting stationary source under the Act.

### FINDING OF VIOLATIONS

#### **Ohio Facilities**

##### **Muskingum River Power Plant**

27. Between January 1, 1978, and the date of this Notice, AEP and Ohio Power Company have made "modifications" as defined by § 52.21(b) and OAC 3745-31 at the Muskingum River Power Plant. These modifications included, but are not limited to, the following individual modifications or projects:

##### Unit 1:

- (1) Non-Responsive - Non-Responsive  
Non-Responsive ;  
(2) Non-Responsive - Non-Responsive

##### Unit 2:

- (3) Non-Responsive || Non-Responsive Non-Responsive

##### Unit 3:

- (4) Non-Responsive - Non-Responsive  
(5) Non-Responsive & Non-Responsive - Non-Responsive

##### Unit 4:

- (6) Non-Responsive - Non-Responsive  
(7) Non-Responsive - Non-Responsive  
(8) Non-Responsive - Non-Responsive

Unit 5:

(9) **Non-Responsive**

28. For each of the modifications listed above that occurred at the Muskingum River Power Plant, neither AEP nor Ohio Power Company obtained a PSD permit pursuant to 40 C.F.R. § 52.21(i) or OAC 3745-31, a nonattainment NSR permit pursuant to OAC 3745-31, or a minor NSR permit pursuant to OAC 3745-31. In addition, no information was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).

**Cardinal Power Plant**

29. Between January 1, 1978, and the date of this Notice, AEP, Ohio Power Company, and Cardinal Operating Company have made "modifications" as defined by 40 C.F.R. § 52.21(b) and OAC 3745-31 at the Cardinal Power Plant. These modifications included, but are not limited to, the following individual modification or project:

Unit 1

- (1) **Non-Responsive**  
(2) **Non-Responsive**

Unit 2

- (3) **Non-Responsive**

30. For the modifications listed above that occurred at the Cardinal Power Plant, neither AEP, Ohio Power Company, nor Cardinal Operating Company obtained a PSD permit pursuant to 40 C.F.R. § 52.21(i) or OAC 3745-31, a nonattainment NSR permit pursuant to OAC 3745-31, or a minor NSR permit pursuant to OAC 3745-31. In addition, no information was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).

**Conesville Power Plant**

31. Between January 1, 1987, and the date of this Notice, AEP and C&SOE Company have made "modifications" as defined by 40 C.F.R. § 52.21(b) and OAC 3745-31 at the Conesville Power Plant. These modifications included, but are not limited to, the following individual modifications or projects:

Unit 5:

- (1) **Non-Responsive**  
(2) **Non-Responsive**  
**Non-Responsive**



Unit 6:

(3) **Non-Responsive**

and

(4) **Non-Responsive** - **Non-Responsive**

32. For each of the modifications listed above that occurred at the Conesville Power Plant, neither AEP nor C&SOE Company obtained a PSD permit pursuant to 40 C.F.R. § 52.21(i) or OAC 3745-31, a nonattainment NSR permit pursuant to OAC 3745-31, or a minor NSR permit pursuant to OAC 3745-31. In addition, no information was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).
33. None of the modifications at the Muskingum River Power Plant, the Cardinal Power Plant and the Conesville Power Plant fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii) and OAC 3745-31. Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In many instances, the replacement component was substantially redesigned in such a way that it resulted in increased capacity, regained lost capacity, and/or extended the life of the unit. That the "routine maintenance, repair and replacement" exemption does not apply to such capital expenditures was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990).
34. None of the modifications at the Muskingum River, Cardinal and Conesville Plants fall within the exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f) for an "increase in the hours of operation or in the production rate." This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and in 1990. *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989); *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990).
35. None of the modifications that occurred at the Muskingum River, Cardinal and Conesville Power Plants fall within the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because for each modification, a physical change was performed which resulted in an emissions increase.
36. Each of the modifications that occurred at the Muskingum River, Cardinal and Conesville

Power Plants resulted in a significant net emissions increase for, NOx, SO2, and/or PM. 40 C.F.R. § 52.21(b)(3)(i) and OAC 3745-31.

37. Therefore, AEP, Ohio Power Company, Cardinal Operating Company and C&SOE Company violated and continue to violate 40 C.F.R. § 52.21 and OAC 3745-31 by constructing and operating modifications at the Muskingum River, Cardinal and Conesville Power Plants without the necessary permit required by the Ohio SIP.
38. Each of these violations exists from the date of start of construction of the modification and continues until the appropriate NSR permit is obtained and the necessary pollution control equipment is operated as required by the Ohio SIP.

### **Indiana Facility**

#### **Tanners Creek Power Plant**

39. Between January 1, 1988, and the date of this Notice, AEP and Indiana Michigan Power Company have made "modifications" as defined by the Indiana SIP, 40 C.F.R. § 52.21(b), APC-19 and 326 IAC 2-2 and 2-3 at the Tanners Creek Power Plant. These modifications included, but are not limited to, the following individual modifications or projects:

#### Unit 4:

- (1) Non-Responsive - Non-Responsive
- (2) Non-Responsive - Non-Responsive

40. For each of the modifications listed above that occurred at the Tanners Creek Power Plant, neither AEP nor Indiana Michigan Power Company obtained a PSD permit pursuant to 40 C.F.R. § 52.21 or 326 IAC 2-1 and 2-2, a nonattainment NSR permit pursuant to APC 19 or 326 IAC 2-1 and 2-3, or a minor NSR permit pursuant to APC 19 or IAC 2-1. In addition, no information was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).
41. None of the modifications at the Tanners Creek Power Plant fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii), APC 19 and 326 IAC 2. Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the life of the unit. In many instances, the replacement component was substantially redesigned in such a way that it resulted in increased capacity, regained lost capacity, and/or extended the life of the unit. That the "routine maintenance, repair and replacement" exemption does not apply to such capital expenditures was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a

Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990).

42. None of the modifications at the Tanners Creek Power Plant, fall within the exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f) for an "increase in the hours of operation or in the production rate." This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and in 1990. *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989); *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990).
43. None of the modifications at the Tanners Creek Power Plant fall within the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because for each modification, a physical change was performed which resulted in an emissions increase.
44. Each of these modifications resulted in a net significant increase in emissions from the Tanners Creek Power Plant for NO<sub>x</sub>, SO<sub>2</sub> and/or PM. 40 C.F.R. § 52.21(b)(3)(i), APC 19 and 326 IAC 2. Therefore, AEP and Indiana Michigan Power Company violated and continue to violate 40 C.F.R. § 52.21, APC 19, and 326 IAC 2 by constructing and operating modifications at the Tanner's Creek Power Plant without the necessary permit required by the Indiana SIP.
45. Each of these violations exists from the date of start of construction of the modification and continues until the appropriate NSR permit is obtained and the necessary pollution control equipment is operated as required by the Indiana SIP.

### **West Virginia Facilities**

#### **Philip Sporn Power Plant**

46. Between January 1, 1989, and the date of this Notice, AEP, Appalachian Power Company, AEP Service Corporation, Central Operating Company and Ohio Power Company made "modifications" as defined by the West Virginia SIP, 45.C.S.R. § 14-2.27 at the Philip Sporn Power Plant. These modifications included, but are not limited to, the following individual modifications or projects:

#### Unit 1:

(1) [REDACTED] Non-Responsive

Non-Responsive  
(2) Non-Responsive

Unit 2:

(3) Non-Responsive Non-Responsive

Unit 5:

(4) Non-Responsive  
Non-Responsive  
(5) Non-Responsive

47. For each of the modifications listed above that occurred at the Philip Sporn Power Plant, neither AEP, Appalachian Power Company, Central Operating Company nor Ohio Power Company requested or obtained a PSD permit pursuant to 45 C.S.R. § 14-6.1, or a minor NSR permit pursuant to 45 C.S.R. § 13-4. In addition, no information was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).

**John Amos Power Plant**

48. Between 1988, and the date of this Notice, AEP, Appalachian Power Company, and Ohio Power Company made "modifications" as defined by the West Virginia SIP, 45 C.S.R. § 14-2.27 at the John Amos Power Plant. These modifications included, but are not limited to, the following individual modifications or projects:

Unit 2:

(1) Non-Responsive  
(2) Non-Responsive Non-Responsive  
Non-Responsive  
(3) Non-Responsive

49. For each of the modifications listed above that occurred at the John Amos Power Plant, neither AEP, Appalachian Power Company, nor Ohio Power Company obtained a PSD permit pursuant to 45 C.S.R. § 14-6.1, or a minor NSR permit pursuant to 45 C.S.R. § 13-4. In addition, no information was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v) and for modifications after December 23, 1996 as required by 45 C.S.R. § 14-2.44.b.

**Kammer Power Plant**

50. Between 1990 and the date of this Notice, AEP and Ohio Power Company made



“modifications” as defined by the West Virginia SIP, 45 C.S.R. § 14-2.27 at the Kammer Power Plant. These modifications included, but are not limited to, the following individual modifications or projects:

Unit 1.

- (1) Non-Responsive - Non-Responsive
- (2) Non-Responsive - Non-Responsive
- (3) Non-Responsive - Non-Responsive

Unit 2:

- (4) Non-Responsive

Unit 3:

- (5) Non-Responsive - Non-Responsive
- (6) Non-Responsive - Non-Responsive
- (7) Non-Responsive - Non-Responsive

- 51. For each of the modifications listed above that occurred at the Kammer Power Plant, neither AEP, Appalachian Power Company, nor Ohio Power Company obtained a PSD permit pursuant to 45 C.S.R. § 14-6.1, or a minor NSR permit pursuant to 45 C.S.R. § 13-4. In addition, no information was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v) and for modifications after December 23, 1996 as required by 45 C.S.R. § 14-2.44.b.
- 52. None of the modifications at the Philip Sporn, John Amos and Kammer Power Plants fall within the “routine maintenance, repair and replacement” exemption found at 45 C.S.R. § 14-2.27.a. Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In many instances, the replacement component was substantially redesigned in such a way that it resulted in increased capacity, regained lost capacity, and/or extended the life of the unit. That the “routine maintenance, repair and replacement” exemption does not apply to such capital expenditures was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. (“WEPCO”) facility. EPA’s interpretation of this exemption was upheld by the court of appeals in 1990. *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990).
- 53. None of the modifications at the Philip Sporn, John Amos and Kammer Power Plants fall within the exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f) for an “increase in the hours of operation or in the production rate.” This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. (“WEPCO”) facility.

EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and in 1990. *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989); *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990).

54. None of the modifications at the Philip Sporn, John Amos and Kammer Power Plants fall within the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) and 45 C.S.R. § 14-2.44.b, as approved by EPA as part of the West Virginia SIP on December 23, 1996, because for each modification, a physical change was performed which resulted in an emissions increase.
55. Each of the modifications resulted in a net significant increase in emissions from the Philip Sporn, John Amos and Kammer Power Plants for NOx, SO2 and/or PM. 45 C.S.R. § 14-2.46.a.
56. Therefore, AEP, Appalachian Power Company and Ohio Power Company violated and continue to violate 45 C.S.R. § 14-6.1, and 45 C.S.R. § 13-4 by constructing and operating modifications at the Philip Sporn, John Amos and Kammer Power Plants without the necessary permit required by the West Virginia SIP.
57. Each of these violations exists from the date of start of construction of the modification and continues until the appropriate NSR permit is obtained and the necessary pollution control equipment is operated as required by the West Virginia SIP.

### **ENFORCEMENT**

Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this Notice, the Regional Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation before January 30, 1997, and no more than \$27,500 per day for each violation after January 30, 1997.

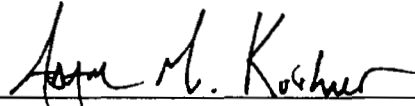
### **OPPORTUNITY FOR CONFERENCE**

Respondents may, upon request, confer with EPA. The conference will enable Respondents to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. Respondents have a right to be represented by counsel. A request for a conference must be made within 10

days of receipt of this Notice, and the request for a conference or other inquiries concerning the Notice should be made in writing to:

David W. Schnare  
Counsel  
Air Enforcement Division  
U. S. Environmental Protection Agency  
1200 Pennsylvania, N.W.  
Washington, D.C. 20460  
Mail Code - 2242A  
(202) 564-4183

June 18, 2004  
Date

  
Adam M. Kushner, Director  
Air Enforcement Division  
Office of Enforcement and Compliance Assurance  
U.S. EPA